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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

BANYAN LIMITED PARTNERSHIP et al.,

Plaintiffs and Appellants,

v.

DAN W. BAER et al.,

Defendants and Appellants.

G046428

(Super. Ct. No. 764271)

O P I N I O N

Appeals from a postjudgment order of the Superior Court of Orange County, Thierry P. Colaw, Judge. Affirmed.

Law Offices of Dennis Hartmann and Dennis Hartmann; The Dressler Law Group and Thomas W. Dressler; Snell & Wilmer, Richard A. Derevan and Todd E. Lundell for Plaintiffs and Appellants.

Enterprise Counsel Group, Benjamin P. Pugh, Teddy Davis, and David A. Robinson; Schadrack & Chapman and C. Michael Chapman for Defendants and Appellants.

This is the last of the three appeals that follow the final judgment in this 16-plus year, multi-phase litigation. In our concurrently filed opinion in *Banyan Limited Partnership et al. v. Baer et al.* (Aug. 12, 2013, G045584) [nonpub. opn.] (*Banyan 1*), we affirm the final judgment. The judgment was against defendants IBT International, Inc. ("IBT") and Southern California Sunbelt Developers, Inc. ("SCSD"), corporations owned by co-defendant Dan W. Baer (hereafter sometimes referred to collectively as Defendants), on the breach of contract cause of action tried in phase 2 of the litigation. Plaintiffs, three Nevada limited partnerships called Banyan Limited Partnership (Banyan), Pear Tree Limited Partnership (Pear Tree), and Orange Blossom Limited Partnership (Orange Blossom) (hereafter referred to collectively as the Grammer Limited Partnerships), were awarded approximately $1.1 million on five promissory notes signed by Baer on behalf of the corporations. The judgment was otherwise in favor of Defendants and against the Grammer Limited Partnerships and four other plaintiffs (the non-Grammer plaintiffs), on all other causes of action and claims in the complaint.[1]

The five promissory notes on which the Grammer Limited Partnerships recovered were governed by the laws of the state of Nevada, under which the trial court has discretion to award attorney fees to a prevailing party if it finds an opposing party's claim or defense "was brought or maintained without reasonable ground or to harass the prevailing party." (Nev. Rev. Stats. § 18.101, subd. 2(b).) The Grammer Limited Partnerships sought attorney fees from IBT and SCSD relating to the phase 2 trial claiming they unreasonably asserted as defenses that Baer's signature on the promissory notes was forged and the loans the notes pertained to had been repaid. Baer and SCSD sought their attorney fees from the Grammer Limited Partnerships for the phase 2 trial

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[1] In our concurrently filed opinion in *Banyan Limited Partnership et al. v. Baer et al.* (Aug. 12, 2013, G045797) [nonpub. opn.] (*Banyan 2*), we reverse a postjudgment order granting the Grammer Limited Partnerships a new trial on its claim that Baer is an alter ego of his corporations.

arguing the Grammer Limited Partnerships had no reasonable ground for suing them on promissory notes on which they were not obligors or guarantors. The trial court denied both motions. Both sides appeal contending the trial court abused its discretion. We find no abuse of discretion and affirm the order.

FACTS AND PROCEDURE

We adopt and incorporate by reference the facts and analysis from our opinion in *Banyan 1*, *supra*, G045584, and summarize them here only as relevant to the issues in this appeal.

In the mid 1980's, Baer, who owned SCSD, retained attorney David H. Tedder to create an asset protection/estate plan for him. The two men subsequently agreed to join forces to market and sell similar estate plans to wealthy individuals. They agreed Tedder would perform the legal work, Baer (a non-attorney) would manage Tedder's law office, and they would split the law firm profits equally and invest them in real estate. IBT was formed to be the holding company for the real estate investments. Baer owned 99 percent of IBT; Tedder owned one percent.

In the late 1980s, Tedder began providing more intricate asset protection services for wealthy clients, including Don Grammer. In short, Tedder created a morass of limited partnerships (aka "controlled accounts") in which an entity controlled by Tedder was general partner and an entity controlled by Grammer (or one of his family members) was limited partner. The Grammer Limited Partnerships are three of those limited partnerships. Grammer's money was placed into domestic and foreign bank accounts owned by the limited partnerships. As general partner, Tedder had complete control over the limited partnerships funds. He could then freely move funds between the various entities and loan or invest the money as he saw fit.

Grammer placed over $11 million into various controlled accounts—about $3.6 million went into the Grammer Limited Partnerships. When the asset protection plan was set up, Grammer told Tedder he wanted $22,500 to be paid monthly from the

Grammer Limited Partnerships to the Grammer family to cover living expenses, and the rest was to be invested.

Despite having numerous clients, the law firm did not make a profit and there were no partnership funds to invest in real estate. Accordingly, Tedder began arranging loans from the controlled accounts, including from the Grammer Limited Partnerships, to IBT and SCSD to acquire real estate. Tedder also made loans from the controlled accounts to the law firm and to other entities he owned.

The Tedder/Baer partnership began falling apart in the mid 1990s. Baer suspected Tedder was diverting law firm profits for his personal use. Sometime in 1991 or 1992, Tedder told Baer that Grammer was threatening to sue the law firm for millions of dollars in loans he had made. Tedder told Baer the lawsuit had been staved off by an agreement to have the law firm pay Grammer $22,500 a month. Baer testified he had no knowledge of Tedder and Grammer's prior agreement to have $22,500 returned monthly to the Grammers. When in late 1995, Grammer called Baer and demanded the Grammer Limited Partnerships' loans be repaid, Baer demanded Tedder provide a complete accounting of the law firm profits and all the loans.

The litigation began in 1996 with a complaint filed by Tedder on behalf of the Grammer Limited Partnerships and numerous other limited partnerships and corporations against Defendants. The complaint alleged the Grammer Limited Partnerships had made loans to Defendants to acquire real estate including properties known as the Ranch and the Guild. The original complaint contained no allegations of any documentation for the loans. Attachments to the complaint identified the loans as including: (1) loans by Banyan to IBT in the amounts of $65,000, $700,000, and $20,000 (all made in 1990), and $100,000 (made in 1993); (2) loans by Orange Blossom to IBT of $150,500 (made in 1990) and $25,000 (made in 1991); (3) a loan by Pear Tree to IBT of $150,000 (made in 1990); and (4) a loan by Pear Tree to SCSD of $70,000 (made in 1991). The complaint was amended several times.

At some time after the original complaint was filed in 1996, in response to discovery requests, the Grammer Limited Partnerships produced photocopies of five promissory notes, four signed by Baer as president of IBT and one signed by Baer as president of SCSD. The promissory notes were for the following loans: (1) a $700,000 loan made on October 1, 1990, by Banyan to IBT; (2) a $150,000 loan made on October 1, 1990, by Pear Tree to IBT; (3) a $150,000 loan made on October 1, 1990, by Orange Blossom to IBT; (4) a $25,000 loan made on February 12, 1991, by Orange Blossom to IBT; and (5) a $70,000 loan made on February 12, 1991, by Pear Tree to SCSD. The notes were each payable in five years by balloon payment (i.e., full principal and all accrued interest). All five promissory notes stated they were governed by Nevada law. The operative complaint at the 2004 phase 2 trial, which was to consider the Grammer Limited Partnerships' loan claims, was the fifth amended complaint filed in 2001. It alleged the Grammer Limited Partnerships were lenders who made "conditional demand loan[s]" to Defendants that were "orally agreed to and later documented in written promissory notes."

Baer claimed he had no recollection of signing the five promissory notes, and it was not Tedder's practice to create promissory notes for loans he made from his client controlled accounts. Baer and Tedder's oral agreement was the loans were 60-day demand loans.

Tedder testified it was not the norm to prepare promissory notes for client loans "'when part of the planning was asset-protection oriented[,]'" and it was not part of his practice to prepare notes when he was arranging for loans to the Baer-owned entities. Tedder explained promissory notes were only prepared if there was a specific client need for one to evidence the debt. He testified the five notes at issue were prepared by his staff in his Florida office sometime in 1995, after the actual loans were made, because they were needed in connection with Grammer's bankruptcy proceeding and in settling pending litigation against Grammer.

The Grammer Limited Partnerships agree Defendants had retained a handwriting expert who opined the signature on the photocopies had been "cut and pasted" from a different document. Defendants' counsel requested the original notes be produced for inspection and analysis, but Tedder and the Grammer Limited Partnerships asserted the original notes had been lost.

Shortly before the originally scheduled trial date of May 21, 2001, the Grammer Limited Partnerships located the original promissory notes. Baer obtained an ex parte order compelling the Grammer Limited Partnerships to turn the notes over to an ink lab for testing. The ink lab determined the five notes bore original signatures placed on the notes around the dates claimed by the Grammer Limited Partnerships. Under questioning at trial by the Grammer Limited Partnerships' counsel, Baer acknowledged the ink lab had confirmed the signatures on the promissory notes were original signatures, but he testified he still had no recollection of signing the promissory notes.

In the phase 2 statement of decision, the trial court, before Judge C. Robert Jameson, made the following findings relevant to this appeal. In 1990 and 1991, Tedder structured six loans from the Grammer Limited Partnerships to IBT and SCSD. Five of the loans were evidenced by promissory notes (as described above). There was no promissory note for a sixth loan of $100,000 made by Banyan to IBT on October 14, 1993, and recovery on that loan was barred by the statute of limitations applicable to oral contracts. Although Baer had testified at his deposition (which was read into the trial record by the Grammer Limited Partnerships' counsel), that his signature on the five notes had been forged, and at trial testified he did not remember signing the notes, the court found Baer did sign the notes on behalf of IBT and SCSD.

The court made findings rejecting Defendants' contention the loans had been repaid. Baer and Gary Case (IBT's chief financial officer and accountant) both testified that in late 1991, or early 1992, Tedder told them Grammer was threatening to sue IBT and SCSD if they did not immediately start repaying the loans. Tedder told them

the law firm would start making $22,500 a month payments on the IBT and SCSD loans. Although the Grammer Limited Partnerships did not dispute they received the monthly payments from 1992 through early 1996, the court found the payments had no connection to the IBT and SCSD loan obligations. None of the accounting records of any of the entities (IBT, SCSD, or the law firm) reflected the $22,500 payments as loan repayments. Tedder and Grammer's agreement to have the Grammer Limited Partnerships make monthly payments to the Grammer family totaling $22,500 a month for living expenses, and the payments themselves, predated the loans. The five-year notes were not yet due when the law firm began making the monthly payments. The notes were not marked paid in full.

Accordingly, in its phase 2 statement of decision the court found Defendants had not overcome the Evidence Code section 635 presumption that "[a]n obligation possessed by the creditor is presumed not to have been paid." IBT owed the Grammer Limited Partnerships the principal and interest due on the four promissory notes signed by Baer as president of IBT, less credit for several payments made directly by IBT to the Grammer Limited Partnerships. And SCSD owed Pear Tree the principal and interest due on the $70,000 note signed by Baer as president of SCSD. Following the phase 2 trial, Judge Jameson granted a motion for judgment to be entered against the Grammer Limited Partnerships in favor of all Defendants on the fourth and fifth causes of action (fraud and negligent misrepresentation), and on two additional loan claims that were not alleged in the complaint, and in favor of Baer on the breach of contract cause of action as to all loans made.

After the phase 2 trial, Judge Jameson retired, but obtained an assignment to preside over post phase 2 trial matters including issuance of the statement of decision and ruling on a proposal to revise the ruling "until completion and disposition of all causes and matters heard pursuant to [these] assignment[s]."

The current trial judge presided over the final two phases of the trial. The phase 3 trial took place in late 2006, and concerned the rights and liabilities of Tedder and Baer as between themselves (e.g., the Tedder/Baer partnership issues). In short, the court found Tedder had no interest in any of the real estate acquired by IBT and SCSD, and because of the illegal nature of their law firm partnership neither could recover anything from the other relating to the law firm.

The matter proceeded to the final phase of trial, phase 4, in 2010. As to the Grammer Limited Partnerships, phase 4 concerned only their remaining breach of fiduciary duty cause of action against Baer. In its statement of decision for phase 4, entered on February 24, 2011, the trial court observed the Grammer Limited Partnerships' theory was that Baer was liable for Tedder's breaches of his fiduciary duties to his law firm clients by engaging in self-interested transactions. The court found the claim was governed by the one-year attorney malpractice statute of limitations of Code of Civil Procedure section 340.6 and was time barred. It also found the Grammer Limited Partnerships had failed to prove their breach of fiduciary duty claim.

On March 29, 2011, after the court entered its statement of decision but before final judgment was entered, the Grammer Limited Partnerships filed their motion seeking attorney fees from IBT and SCSD related to the phase 2 trial. The five promissory notes on which they prevailed were governed by Nevada law. Nevada Revised Statutes section 18.010, subdivision 2(b), gives the trial court discretion to award attorney fees when it finds an opposing party's claim or defense "was brought or maintained without reasonable ground or to harass the prevailing party." The Grammer Limited Partnerships asserted IBT and SCSD had no reasonable basis for asserting as defenses (1) that the five promissory notes had not been signed by Baer, and (2) that loans had been repaid via the $22,500 monthly payments the law firm was making to the Grammer Limited Partnerships.

IBT and SCSD's opposition to the motion was supported by declarations from Baer and attorney, C. Michael Chapman, who represented Defendants at the phase 2 trial. Baer explained the basis for the defenses. He reiterated his trial testimony about Tedder's representation to him that to avoid litigation with the Grammers, IBT and SCSD had to start repaying the loans immediately. Tedder proposed making payments of $22,500 from law firm profits, and to ensure the payments were made, Tedder and Baer both agreed to forgo their salaries to make sure the law firm had sufficient funds to pay Grammer. When from time to time, Tedder told Baer additional payments were needed, Baer would direct IBT to make payments directly to the Grammer Limited Partnerships. As for the forgery claim, Baer declared that when the Grammer Limited Partnerships presented him with photocopies of the five promissory notes, he had no recollection of signing them. And since it was not Tedder's custom and practice to prepare notes, and Baer believed the Grammer Limited Partnerships' loans had been repaid, Baer suspected the signature on the notes were forged.

Chapman declared that when the photocopies of the notes were produced in discovery, he requested the originals be produced. For five years the originals could not be produced, and no one could explain what happened to them. Tedder and the Grammer Limited Partnerships resisted discovery attempts. When the Grammer Limited Partnerships finally found the original notes, they refused to produce them for testing. Chapman filed an ex parte application for ink lab analysis, which the trial court granted. When the ink lab determined the signatures on the original promissory notes were placed on the notes around the time the Grammer Limited Partnerships claimed the notes were signed, Defendants stopped pursuing their forgery defense.

The trial court entered the final judgment on May 31, 2011.[2] It awarded the Grammer Limited Partnerships approximately $1.1 million in damages against IBT and

[2] On November 15, 2011, the court entered a corrected final judgment.

SCSD, plus pre- and postjudgment interest, on the breach of contract and common counts causes of action in accordance with Judge Jameson's August 30, 2005, statement of decision. The judgment was in Baer, IBT, and SCSD's favor on all remaining causes of action as to the Grammer Limited Partnerships and on all causes of action as to the non-Grammer plaintiffs.

On July 27, 2011, Baer and SCSD filed their motion for phase 2 attorney fees against the Grammer Limited Partnerships under the same Nevada statute. They contended the Grammer Limited Partnerships had no reasonable grounds for maintaining the breach of contract cause of action against Baer and SCSD on promissory notes on which they were not borrowers (i.e., as to Baer all the promissory notes and as to SCSD the four promissory notes representing Grammer Limited Partnerships' loans to IBT). The Grammer Limited Partnerships opposed the motion largely on the grounds they had reasonably sued Baer and SCSD as alter egos, the phase 2 trial was to address the Grammer Limited Partnerships' claims but not alter ego claims, and whether there was alter ego liability for the judgment was unresolved.

On August 23, 2011, the trial court issued its minute order denying both motions. The minute order gave no explanation for the ruling.

DISCUSSION

The Grammer Limited Partnerships and Baer and SCSD appeal the order denying their motions for attorney fees. Each contends the trial court abused its discretion by denying them attorney fees relating to phase 2 of the litigation. We reject their arguments.

1. General Legal Principals & Standard of Review

The five promissory notes that were the subject of the phase 2 trial stated they were governed by Nevada law. Nevada Revised Statutes section 18.010, subdivision 2 (hereafter section 18.010) provides in relevant part, "the [trial] court may make an allowance of attorney[] fees to a prevailing party: [¶] . . . [¶] (b) Without regard

to the recovery sought, when the court finds that the claim . . . or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party. The court shall liberally construe the provisions of this paragraph in favor of awarding attorney[] fees in all appropriate situations. It is the intent of the Legislature that the court award attorney[] fees pursuant to this paragraph and impose sanctions pursuant to Rule 11 of the Nevada Rules of Civil Procedure in all appropriate situations to punish for and deter frivolous or vexatious claims and defenses because such claims and defenses overburden limited judicial resources, hinder the timely resolution of meritorious claims and increase the costs of engaging in business and providing professional services to the public."

"The decision to award attorney fees [under section 18.010] is within the sound discretion of the district court and will not be overturned absent a 'manifest abuse of discretion.'" (*Kahn v. Morse & Mowbray* (2005) 121 Nev. 464, 479 [117 P.3d 227, 238] (*Kahn*); see also *Schmidt v. Washoe County* (2008) 124 Nev. 1506 [238 P.3d 852] ["premise of the statute is discretionary"].) An abuse of discretion occurs only when the trial court "exceeds the bounds of reason, all of the circumstances before it being considered." (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566 (*Denham*).) A trial court might be said to have abused its discretion where it has applied an incorrect legal standard (*McPhearson v. Michaels Co.* (2002) 96 Cal.App.4th 843, 851), or when its factual findings, whether express or implied, are not supported by substantial evidence (*Federal Home Loan Mortgage Corp. v. La Conchita Ranch Co.* (1998) 68 Cal.App.4th 856, 860). Here, the trial court gave no explanation for its ruling. Under well-established principles of appellate review: "'A judgment or order of the lower court is *presumed correct.* All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.'" (*Denham*, *supra*, 2 Cal.3d at p. 564.)

We reject the Grammer Limited Partnerships' contention that we should apply a higher standard of review due to the unavailability of Judge Jameson to hear the attorney fees motions. As noted above, following the phase 2 trial, which took place in 2004, Judge Jameson retired, but obtained an assignment to preside over post phase 2 trial matters in 2005 including issuance of the statement of decision and ruling on a proposal to revise the phase 2 ruling. The phase 2 statement of decision was entered in August 2005. The Grammer Limited Partnerships assert retired Judge Jameson was the proper judge to hear the attorney fees motions, filed in 2011 after completion of phase 4, because they pertained to his phase 2 ruling. But Judge Jameson was unavailable to hear the motions because of a conflict that had arisen after the phase 3 trial (before Judge Colaw) was completed. The Grammer Limited Partnerships offer no authority for the proposition asserted in their opening brief that because Judge Jameson's unavailability was allegedly intentionally procured by Baer's trial counsel, we should apply a de novo standard of review to Judge Colaw's ruling denying them attorney fees.

To the extent the Grammer Limited Partnerships are suggesting attorney fees should have been awarded *because* Judge Jameson's unavailability was somehow improperly procured by Baer's counsel (e.g., as a sanction), that ground was never raised below, and may not be raised now. (See *Newton v. Clemons* (2003) 110 Cal.App.4th 1, 11 ["'[I]t is fundamental that a reviewing court will ordinarily not consider claims made for the first time on appeal which could have been but were not presented to the trial court.' . . . '[W]e ignore arguments, authority, and facts not presented and litigated in the trial court. Generally, issues raised for the first time on appeal which were not litigated in the trial court are waived. . . . '"].) Moreover, the Grammer Limited Partnerships ignore the trial court specifically found no improper conduct on the part of Baer's counsel. [3]

[3] In their March 2011 motion for new trial relating to their alter ego claim, the Grammer Limited Partnerships' attorney, Dennis Hartmann, declared he had always intended to present claims for attorney fees relating to the phase 2 breach of contract

The Grammer Limited Partnerships also contend that regardless of the reasons for Judge Jameson's unavailability, we should apply a "modified" or "heightened" abuse of discretion standard of review because of Judge Jameson's unavailability. There is authority for the proposition that "when . . . the [attorney] fee order under review was rendered by a judge other than the trial judge, we may exercise '*somewhat more latitude* in determining whether there has been an abuse of discretion than would be true in the usual case.'" [Citation.]" (*Center For Biological Diversity v.*

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claims on which the Grammer Limited Partnerships prevailed to Judge Jameson. Although Judge Jameson had retired in 2004, counsel believed his assignment to sit on phase 2 posttrial matters in 2005 encompassed posttrial attorney fees because it stated it was to last "until completion and disposition of all causes and matters heard pursuant to [these] assignment[s]." Hartmann declared that after the phase 4 statement of decision was signed in 2011, he attempted to schedule his planned post phase 2 trial motions (i.e., to amend the judgment to add Baer as a judgment debtor as an alter ego of the corporate defendants and for phase 2 attorney fees) before Judge Jameson, but was informed Judge Jameson had to recuse himself because he had formed a "'personal business relationship'" with Baer's counsel—Enterprise Counsel Group and David A. Robinson. Apparently, in unrelated litigation, Robinson was acting as counsel for a corporation whose board of directors was in disarray and deadlocked. In 2007, after the phase 3 trial in this case was completed, Robinson (who was not himself involved in the phase 2 litigation before Judge Jameson, although other attorneys from his office were, but who was involved in phase 3) and opposing counsel selected Judge Jameson from a list of two retired judges proposed by the trial judge in the unrelated litigation to become a provisional neutral director of the corporation.

On July 19, 2011, when the trial court ruled on the Grammer Limited Partnerships' new trial motion, it rejected any suggestion Baer's trial counsel, Robinson, had intentionally interfered with Judge Jameson's ability to hear postjudgment motions pertaining to phase 2. Several years had passed since the phase 2 trial and Judge Jameson's retirement. Robinson did not seek Judge Jameson out for the neutral position in 2007; rather counsel for both sides were presented with two names of retired judges to sit as an independent director of the corporation and both sides agreed on Judge Jameson. The trial court commented, "At that point I could understand how you would feel that Judge Jameson was no more a part of this case, because quite frankly until I read this motion I really didn't think he was a part of this case anymore either. [¶] Just because you sat together on a board I don't necessarily--under those circumstances I don't necessarily find that you were trying to get Judge Jameson somehow kicked off the case when--even to me I didn't think he was still on the case. [¶] . . . I don't really accept the connection or the impropriety that requires that I do anything."

County of San Bernardino (2010) 188 Cal.App.4th 603, 616, italics added.) But our standard of review is still abuse of discretion. Given the unusual nature of this case and the fact the current trial judge spent almost six years presiding over the litigation, spending months trying the last two phases and rehearing much of the same evidence that was presented in phase 2, his rulings are entitled to great deference. And even if we afford ourselves "more latitude" in reviewing the trial court's order denying both sides their attorney fees in this litigation, as we shall explain below we simply cannot say the trial court abused its discretion.

2. The Grammer Limited Partnerships' Appeal

With the above principles in mind, we turn first to the Grammer Limited Partnerships' contention they were entitled to their attorney fees relating to phase 2 of this litigation, which pertained to the five loans evidenced by promissory notes. The requisites for an award of attorney fees under section 18.010, subdivision 2(b), are that the party seeking fees be the prevailing party and the opposing party "brought or maintained" a claim or defense "without reasonable ground[s.]" The Grammer Limited Partnerships argue they were the prevailing party at the phase 2 trial on the contract cause of action and IBT and SCSD had no reasonable grounds for asserting the notes were not signed by Baer (i.e., the "forgery" defense) or the notes had been paid in full (i.e., the "repayment" defense).

We need not decide whether the Grammer Limited Partnerships were the prevailing parties for purposes of section 18.010 attorney fees. We infer from the court's denial of attorney fees that it found IBT and SCSD had reasonable grounds for the defense claims they asserted and, as we explain, that finding is supported by the record.

A. The "Forgery" Defense

We cannot say the trial court abused its discretion in finding there were reasonable grounds for the forgery defense. Under Nevada law, "for purposes of an award of attorney[] fees pursuant to [section] 18.010, [subdivision 2(b)], '[a] claim is

groundless if "'"the allegations in the complaint . . . are not supported by *any* credible evidence at trial."' [Citation.]" (*Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals* (1998) 114 Nev. 1348, 1354 [971 P.2d 383, 387], italics added.)

The original complaint contained no allegations that any of the loan agreements were reduced to writing. Grammer Limited Partnerships agree that only photocopies of the five promissory notes were originally produced by them in discovery, not the originals. Baer articulated a plausible reason for suspecting the photocopies were not authentic. He could not recall signing the notes, and he and Tedder testified having signed notes was not the usual practice. A handwriting expert indicated the signatures on the photocopies appeared to have been cut and pasted. The original notes could not be located by the Grammer Limited Partnerships until six years into the litigation. It was the defense that demanded an ink lab test of the signatures. An ink lab determined the signature on the notes was an original signature placed on the documents around the time the Grammer Limited Partnerships asserted the promissory notes were prepared (Tedder testified the notes were prepared several years after the loans were made and were prepared to assist Grammer in other litigation). Baer's phase 2 trial counsel declared that once the ink lab results came back, the defense stopped pursuing the forgery issue. The Grammer Limited Partnerships point to nowhere in the record from the phase 2 trial indicating the defense asserted as a defense at trial that the notes were forged. Rather, it was the Grammer Limited Partnerships' counsel who introduced the issue at trial by asking Baer about his earlier claim the signature on the photocopies was forged. Although Baer testified at trial that he still had no memory of signing the notes, Baer's counsel did not argue the notes were forged, he argued the Grammer Limited Partnerships counsel was using the Baer's lack of recollection as to signing the notes to attack his credibility.

The Grammer Limited Partnerships argue the trial court's implied finding the forgery defense was not unreasonably asserted impermissibly conflicts with

Judge Jameson's phase 2 finding Baer had in fact signed the notes.[4] But the finding Baer signed the notes does not equate to a finding Baer lied when he testified he could not remember signing them. Nor does it equate to a finding Baer unreasonably doubted the signatures that appeared on the *photocopies* the Grammer Limited Partnerships produced in discovery.

B. The "Repayment" Defense

The Grammer Limited Partnerships also argue IBT and SCSD had no reasonable grounds for asserting the loans represented by the five promissory notes had been repaid via the monthly $22,500 payments Tedder's law firm was making to the Grammers. We disagree.

In his phase 2 statement of decision, Judge Jameson concluded the five promissory notes were signed by Baer, they were not marked cancelled, and IBT and SCSD did not overcome the Evidence Code section 635 presumption that "[a]n obligation possessed by the creditor is presumed not to have been paid." "The presumption of nonpayment appears based to some extent on the negotiability of an unconditional promissory note, and to some extent on the simple inadvisability of repaying a note without receiving cancellation of the note. If a note is unconditional and therefore

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[4] The Grammer Limited Partnerships cite Code of Civil Procedure section 661, which provides a motion for new trial must be heard by the same judge who presided over the trial, unless the original trial judge in unavailable. (See also Cal. Rules of Court, rule 3.1591 [in bifurcated trial before different judges, each judge must hear and determine new trial motion as to issues tried by that judge].) And in the case of unavailability of that trial judge, the judge ruling on the new trial motion "*cannot* modify the statement of decision or judgment based on conflicting evidence." (Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2012) ¶ 18.327, pp. 18-69 to 18-70.) The Grammer Limited Partnerships cite no authority that compels extending this rationale to post trial motions for discretionary attorney fees when the original trial judge is unavailable. Their reliance on *Abbott v. Mandiola* (1999) 70 Cal.App.4th 676, is also misplaced. That case held "the judge who declares a mistrial must also hear any request for sanctions against anyone causing that mistrial[,]" *if* the original judge is able to do so. (*Id.* at p. 678.) Here, there is no dispute Judge Jameson was unavailable to hear the attorney fees motion.

negotiable, the uncancelled note could be sold to a holder in due course, who could then enforce it against the maker of the note." (*Remington Investments, Inc. v. Hamedani* (1997) 55 Cal.App.4th 1033, 1041.)

"[T]he presumption in Evidence Code section 635 is a rebuttable presumption [citations]." (*Gabriel v. Wells Fargo Bank, N.A.* (2010) 188 Cal.App.4th 547, 555). The trial court did not abuse its discretion by concluding IBT and SCSD had at least some reasonable ground for asserting the presumption was overcome.

IBT and SCSD never disputed they received the money represented by the five notes (e.g., they did not deny the loans), but they contended the loans had been paid back via the $22,500 a month payments made by the law firm. Baer and Case both testified Tedder told them in 1991 that Grammer was threatening to sue if he did not start getting repayment of the loans and Tedder said the law firm would start making monthly payments of $22,500 (e.g., from law firm profits) to repay the loans. Baer and Tedder agreed to forgo their monthly law firm salary to make sure there were sufficient funds to make the monthly payment. The total of the law firm's payments made over the years exceeded the amount of the loans. The Grammer Limited Partnerships point to Judge Jameson's finding the monthly payments began much earlier—October 1990—as demonstrating the payments were not connected to the loans. But Baer testified he did not know Tedder was already making monthly payments of $22,500 to the Grammer Limited Partnerships.

The Grammer Limited Partnerships also rely on Judge Jameson's finding the promissory notes were not yet due when Tedder supposedly told Baer in 1991 that Grammer was threatening to sue on them. The written notes were five-year balloon payment notes and not due until starting in 1995. But as the Grammer Limited Partnerships point out in their opening brief, Baer also testified he and Tedder agreed the Grammer loans, the loans made in later 1990 and early 1991, were to be oral, 60-day demand loans. That assertion is consistent with the early versions of the complaint that

contained no allegations of written notes, but alleged the loans were agreed to orally and were "'conditional demand loan[s]'" payable on demand once the real estate the loans funded generated proceeds with which to repay the loans. There was evidence the written notes were not prepared until several years after the loans were made—Tedder testified sometime around 1995. That assertion is consistent with the operative complaint at the time of the phase 2 trial (the fifth amended complaint) which alleged the Grammer Limited Partnerships were lenders who made "conditional demand loan[s]" to Defendants that were "orally agreed to and later documented in written promissory notes."

Finally, the Grammer Limited Partnerships rely on the lack of accounting records demonstrating the monthly payments were repayment of the loans. Although the lack of corroborating accounting records to support the repayment defense certainly weighed heavily in Judge Jameson's credibility determinations, the Grammer Limited Partnerships cite no authority suggesting that without such records the Evidence Code section 635 presumption could never be overcome. Although Baer's testimony was ultimately rejected by Judge Jameson, we cannot say the trial court abused its discretion by finding the repayment defense was not maintained "without reasonable ground or to harass" the Grammer Limited Partnerships. (§ 18.010, subd. 2(b).) Accordingly, the court did not abuse its discretion by denying the Grammer Limited Partnerships' motion for attorney fees.

3. Baer and SCSD's Appeal

Baer and SCSD separately appeal from the order denying their motion for attorney fees against the Grammer Limited Partnerships. They contend they are entitled to attorney fees under section 18.010, subdivision 2(b), because Grammer Limited Partnerships had no reasonable ground for suing them on notes to which they were not a party or guarantor, i.e., all five promissory notes as to Baer and the four IBT notes as to SCSD. Following the phase 2 trial, the court granted Baer and SCSD's motion for judgment on those claims.

We infer from the trial court's denial of Baer and SCSD's motion for attorney fees that it found the Grammer Limited Partnerships had reasonable grounds for pursuing the breach of contract cause of action against them on all five notes. We cannot say the trial court abused its discretion. The Grammer Limited Partnerships alleged all the Defendants (Baer, IBT, and SCSD) were directly liable for all the loans made by the Grammer Limited Partnerships, but also alleged that each was liable as an alter ego of the other. The parties stipulated alter ego claims would not be litigated during phase 2, but would be decided in a later phase, after other issues were resolved.

Baer and SCSD argue the alter ego allegations are irrelevant because the trial court found the Grammer Limited Partnerships abandoned their alter ego claim when they did not present any evidence on alter ego at the final phase of trial, phase 4. We conclude in *Banyan 1, supra,* G045584, the Grammer Limited Partnerships did indeed abandon their alter ego claim by failing to litigate the issue at what was supposed to be the final phase of trial. And in *Banyan 2, supra,* G045797, we conclude the order granting new trial on alter ego must be reversed because the trial court lost jurisdiction by failing to timely rule on the motion. We will not repeat our discussion from those opinions. Nonetheless, the fact the Grammer Limited Partnerships abandoned their alter ego claims is not tantamount to finding they were maintained without reasonable ground or to harass Baer and SCSD. There is evidence in the record, including Baer's testimony he considered everything (the law firm, the real estate, and the corporations) to be part of his joint venture with Tedder—a 50/50 "pot," and there was evidence of comingling of assets among the entities. Accordingly, we cannot say the trial court abused its discretion by finding the alter ego claim had arguable merit, even though it was ultimately not proven at the final phase of trial. Because we conclude the record supports this finding, we need not consider Baer and SCSD's other contentions.

DISPOSITION

The order is affirmed. In the interests of justice, each side shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

O'LEARY, P. J.

WE CONCUR:

RYLAARSDAM, J.

BEDSWORTH, J.